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No. 80-367

IN THE

Supreme Court of the United States

October Term, 1980

PRESBYTERIAN CHURCH OF HARRISBURG,
a non-profit Corporation,
Petitioner,

versus

LIBERTY MUTUAL INSURANCE COMPANY,
a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Questions Presented for Review.

(1) Does not the Supreme Court of the United States lack jurisdiction to consider for the first time on Petition for Writ of Certiorari a claimed violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, when that question was never presented, either explicitly or implicitly, to any of the courts below?

(2) Even if the equal protection issue is properly before this Court, do there exist adequate, independent non-federal grounds for affirmance of the opinion of the Superior Court of Pennsylvania?

(3) Does the opinion of the Superior Court of Pennsylvania, based upon the common law of the Commonwealth, holding that Petitioner had no insurable interest in the property in question violate the equal protection clause of the Fourteenth Amendment to the United States Constitution?

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Opinions and Judgments Below

No opinion was rendered by the Supreme Court of Pennsylvania, that Court having refused to exercise its discretion to review the opinion of the Superior Court of Pennsylvania. The opinion of the Superior Court of Pennsylvania has not yet been reported officially, but was issued by the Court under Docket No. 242 March Term, 1978. This opinion affirmed the opinion of the Dauphin County Court of Common Pleas, 100 Dauphin Co. R. 391 (1978), and both opinions appear in the Appendix to the Petition for Writ of Certiorari. Both the common pleas and superior courts held, that on the date of the fire loss

in question, Petitioner could not collect under Respondent's fire insurance policy because it had a "mere possibility of an expectancy" that it might exercise an option to repurchase the subject property upon the happening of a contingency, and that under prevailing law this did not amount to an insurable interest. In addition, the Dauphin County Court of Common Pleas held, independent of this reason, that Petitioner was not entitled to recover because Respondent was not notified of a merger between Westminster Presbyterian Church (the named insured under Respondent's policy), and Petitioner; such notice being a condition precedent to continuing insurance coverage for Petitioner; and furthermore, that any arguable ownership interest Petitioner had in the insurance policy issued by Respondent was divested by Petitioner's own actions when it executed "for valuable consideration" a written assignment of its "rights, title and interest" in the policy to Christ Gospel, a congregation which had purchased the church building, and which later burned.

Jurisdiction

Petitioner purportedly bases the jurisdiction of this Court upon 28 U.S.C. §1257 (3). Nevertheless, jurisdiction is lacking in this honorable Court by virtue of the fact that Petitioner, despite numerous opportunities to do so, consistently failed to raise the issue, now sought to be reviewed in this court, before *any* of the Courts of the Commonwealth of Pennsylvania. Petitioner's attempt to raise the Fourteenth Amendment issue for the first time in its Petition for Writ of Certiorari to this Court, an issue never either explicitly or implicitly raised in those Courts, renders this Court without jurisdiction to entertain the issue.

This Court has consistently maintained that it lacks jurisdiction to review an issue first presented for review in the Supreme Court of the United States, which could have been presented to the courts below. *Tacon v. State of Arizona*, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973); *Street v. New York*, 394 U.S. 576, 89 S. Ct. 1354; 22 L. Ed. 2d 572 (1969); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S. Ct. 1162, 22 L. Ed. 2d 398 (1969); *Beck v. Washington*, 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962); *Murdock v. City of Memphis*, 20 Wall. 590, 22 L. Ed. 429 (1875).

Indeed, Petitioner concedes that it did not argue its constitutional claim in any of the courts below (Petition for Writ of Certiorari at 6). Instead, Petitioner relies upon certain dictum from *Manhattan Life Insurance Co. v. Cohen*, 234 U.S. 123, 34 S. Ct. 874, 58 L. Ed. 1245 (1913). It is noted that even that case fails to support Petitioner's plea that this Court accept jurisdiction. The case holds that it is irrelevant for this Court to inquire how and when a federal question was raised in a Court below *when it appears that question was actually considered and decided.* No such claim has been made in this case; nor could it be made. Accordingly, the Petitioner having failed to address his claims, initially, to the Courts below, this Court lacks jurisdiction to decide the questions presented in the Petition.

Counter-Statement of the Case

The following facts were stipulated to by Petitioner and Respondent, parties below:

1. Westminster Presbyterian Church for many years owned a church structure at the corner of Green and Reily Streets in the City of Harrisburg, Dauphin County, Pennsylvania.

2. In May of 1968, Westminster Presbyterian Church and Defendant [Respondent], Liberty Mutual Insurance Company, entered into a three year contract of insurance whereby Liberty Mutual provided a multi-peril insurance policy which protected the Westminster Church property, its contents and its fine arts, with limits of $250,000.00, $12,000.00 and $47,719.00 coverages respectively. This policy was renewed for an additional three year period from 1971 through 1974. A premium covering the period from May of 1972 through May of 1973 was requested by Liberty and paid on behalf of Westminster.

3. On August 13, 1972, Westminster Presbyterian Church merged into Presbyterian Church of Harrisburg [Petitioner], and Presbyterian then acquired the former Westminster premises.

4. On December 19, 1972, Presbyterian sold the Church building and executed a written "assignment" of the Liberty insurance policy to Christ Gospel Temple for a consideration of $750.00. The parties executed a document entitled "Assignment of Insurance Policy".

5. The Liberty policy provides "assignment of this policy shall not be valid except with the written consent of this Company". There was no written consent by Liberty Mutual to the assignment nor actual notice of the assignment.

6. The Deed for the Church premises dated December 6 contained the following provision: "THIS conveyance is made in this Deed delivered on the condition and reservation hereinafter set forth,

and by the acceptance of the same the Grantee binds itself, its successors and assigns, as follows: Inasmuch as faithful members of the former Westminster Presbyterian Church have by their individual and corporate commitment over a period of nearly a century dedicated these premises to the worship of God and Christ, and the consideration agreed to herein is premised largely on the desire that such use be continued, the Grantee by acceptance of the Deed does agree for itself, its successors and assigns, that if at any time during the period of ten years next following the date hereof, a principal purpose for which the premises or any part thereof (including the present structure or any other structure to be built thereon) are used or to be used should be other than Christian worship as aforesaid, the Grantee, its successors or assigns, at the option of the Grantor, reconvey said premises to the Presbyterian Church of Harrisburg upon repayment or tender of repayment by the said The Presbyterian Church of Harrisburg to the Grantee, its successors or assigns, of the consideration hereinabove set forth in this Deed."

7. On February 19, 1973, the previously mentioned Church building sustained substantial fire damage which was one of the listed coverages under the Liberty policy.

8. Following the fire, Liberty was advised of the merger, the sale, the purported assignment of the coverage and Liberty requested both Christ Gospel Temple and Presbyterian to sign a nonwaiver agreement, which they did.

> 9. After completing its investigation, Liberty disclaimed coverage on the basis that neither Christ Gospel nor Presbyterian had an insurable interest because of the merger and sale and because of the fact that Liberty had no notice nor had it given its consent to the assignment of the Liberty policy.

With respect to stipulated fact No. 4, the "Assignment of Insurance Policy" provided as follows:

> "*FOR VALUE RECEIVED*, the Presbyterian Church of Harrisburg successor by merger to Westminster Presbyterian Church *does hereby assign and set over all right, title and interest* in and to the hazard insurance policy together with all Riders and coverages as such contracts are now in effect, being a Special Multi-Peril Policy of Liberty Mutual Insurance Company, No. KA 1-531-018430-011, unto Christ Gospel Temple, which Policy provides coverages for the Church building known as Westminster Presbyterian Church, located at the northeast corner of Green and Reily Streets in the City of Harrisburg, Dauphin County, Pennsylvania." (emphasis added).

Petitioner seeks to cloud the issue before this Court by interjecting irrelevant matters, such as references to Christ Gospel Temple being a small black congregation, and referring to the Westminster structure as a "beautiful stone building, which eventually gained recognition as an historic landmark." (Petition for Writ of Certiorari at 4). Moreover, Petitioner neglects to mention that following the merger of Westminster with Presbyterian, the Westminster structure was vacated by Westminster, and at least to some extent fell into disrepair. By December 4, 1972, which was prior to the conveyance to Christ Gospel, windows and other fixtures had been broken, and, as with any vacated building, the possibility of fire,

whether by accident or intent, was substantially different than when it was occupied and regularly used and maintained. These facts were specifically found by the Court of Common Pleas, sitting without jury (Appendix to Petition for Writ of Certiorari at 16a). Finally, Petitioner neglects to mention that the purported assignment of the insurance policy to Christ Gospel Temple was for a separate consideration of $750, which amount approximated the unexpired premium paid in advance by Westminster, not Petitioner, for the then current year. These facts, as well, were found by the Court below (Appendix to Petition for Writ of Certiorari at 11a).

Finally, after a non-jury trial, the Court of Common Pleas articulated three bases for concluding that Petitioner was not insured by Respondent's policy at the time of the loss:

> "(1) Liberty [Respondent] was not notified of the merger between Westminster and Presbyterian [Petitioner];
>
> (2) Any arguable ownership interests of Presbyterian in the policy was divested by Presbyterian's own act when it executed 'for consideration' a written assignment of its own 'right, title and interest' in the policy to Christ Gospel; and
>
> (3) Presbyterian had no insurable interest in the property in any event." (Appendix to Petition for Writ of Certiorari at 13a-14a).

Although *each* of these bases was legally sufficient to support the verdict in favor of Respondent, Petitioner attacks only the third basis, and on a ground never presented to any of the courts below. Thus, not only is it clear that this Court is without jurisdiction to determine the issue as phrased by Petitioner, but as well, there exists two independent, non-federal grounds for affirmance of the Courts below.

ARGUMENT

A. The Supreme Court lacks jurisdiction to decide an issue presented by Petitioner for the first time on Petition for Writ of Certiorari to this Honorable Court.

It is fundamental that when ample opportunity exists to present a question to the lower courts, this Court lacks jurisdiction to entertain such question presented for the first time in this Court, absent exceptional circumstances. *See Beck v. Washington*, 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962), and cases cited in the Jurisdictional section of this brief. As stated in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 17 S. Ct. 709, 41 L. Ed. 1149 (1897):

> "The jurisdiction of this Court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such Court intended to assert a Federal right." 166 U.S. at 655, 17 S. Ct. at 711, 41 L. Ed. at 1152.

Petitioner totally ignores this fundamental rule of Supreme Court jurisprudence in seeking review of the question presented, by raising it for the first time in this Court. The failure is inexplicable. From the outset of this entire litigation, Petitioner was presented with Respondent's defense that it had "no insurable interest" in the property in question. This defense was raised in the initial pleadings, and was consistently argued by Respondent before the Court of Common Pleas of Dauphin

County, the Superior Court of Pennsylvania, and in opposition to Petitioner's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania.*

Clearly, Petitioner was more than fully aware that this was to be a central issue in the case. Nevertheless, Petitioner wholly failed to raise the Fourteenth Amendment argument now pressed before this Court. Under these circumstances, no principle could be clearer but that this Court is without jurisdiction to entertain the instant Petition for Writ of Certiorari. Accordingly, the Petition should be dismissed.

B. Independent, non-federal grounds exist for affirmance of the opinion of the Superior Court of Pennsylvania, and of the Court of Common Pleas of Dauphin County.

This Court has consistently adhered to the self-imposed principle that it will not review a state court judgment which rests upon adequate and independent, non-federal grounds, even in the event that a federal question is involved and perhaps wrongly decided. *Murdock v. City of Memphis*, 20 Wall. 590, 635, 22 L. Ed. 429, 444 (1875). As succinctly stated in *Herb v. Pitcairn*, 324 U.S. 117, 65 S. Ct. 459, 89 L. Ed. 789 (1945):

> "The reason is so obvious that it has rarely been through to warrant statement. It is found in the partitioning of power between the state and federal

* It appears Petitioner has sought a Writ of Certiorari directed to the wrong court. The instant Petition is addressed to the Supreme Court of Pennsylvania; however, the only Pennsylvania appellate court to review the case on the merits was the superior court. The Pennsylvania Supreme Court, in its discretion, declined to review this case in any fashion. Accordingly, it would appear that the instant petition should be addressed to the Pennsylvania Superior Court. *See, e.g., Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968).

> judicial systems and in the limitation of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights, and our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review could amount to nothing more than an advisory opinion." 324 U.S. at 125-126, 65 S. Ct. at 463, 89 L. Ed. at 794.

Two such grounds clearly exist in the present case.

1. Respondent did not consent to provide insurance coverage to Petitioner.

First, as found by the Dauphin County Court of Common Pleas, Respondent was not notified of the merger between Westminster and Presbyterian, and under the facts as found by the court, it therefore, found a compelling reason for requiring such notice as a condition precedent to the existence of insurance coverage for Petitioner. The policy in question contains a condition on the front page which provides that "assignment of this policy shall not be valid except with the written consent of the company [Respondent]." The court held, having failed to so notify Liberty [Respondent] and obtain its consent, Presbyterian [Petitioner] could not maintain a claim under the policy. As pointed out by the Superior Court, the provision in question is not simply a self-protective clause inserted at the whim of Liberty, but rather is a *legislatively mandated* provision *specifically required* to be included in fire insurance policies such as the one at issue in this case. (Appendix to Petition for Writ of Certiorari at 6a).

Pennsylvania law has consistently held that a contract for fire insurance is a personal contract, which affords the insurer the right to choose with whom it will contract. *Donovan v. New York Cas. Co.*, 373 Pa. 145, 94 A.2d 570 (1953); *Spires v. Hanover Ins. Co.*, 364 Pa. 52, 70 A. 2d 828 (1950); *Olyphant Lumber Co. to the use of Patrick McGouldrick v. Peoples Mutual Livestock Ins. Co. of Philadelphia*, 4 Pa. Super. Ct. 100 (1897). Thus, as the Court of Common Pleas held, the merger between Westminster, the named insured, and Presbyterian, did not result in Presbyterian becoming an insured under the insurance policy in question.

Three reasons exist for this under the facts of the case. First, neither Westminster nor Presbyterian gave notice of the merger to the Defendant. This omission violated the nature of the contract in general, and specifically violated the provision of the policy which stated that coverage shall only be provided for the "insured named in the declaration", *i.e.*, Westminster. Second, in addition to failing to notify the Respondent of the merger and also that Westminster was no longer holding the policy, both Westminster and Presbyterian failed to obtain Respondent's written consent to any assignment of the policy, as required by the anti-assignment provision and Pennsylvania statutory law.

Finally, the facts bear out that the merger between Westminster and Presbyterian caused an abandonment of the church structure for a period of time, during which the building fell into disrepair. Obviously, this is factual evidence of a material increase in the risk which the Respondent had insured for Westminster and, taken together with the merger, the subsequent sale of the pro-

perty, and the assignment of the policy to Christ Gospel, it is also factual evidence of a "material alteration in the undertakings insured by Liberty". All of these were found as fact by the trial court. It is to be noted that factual determinations such as these are not reviewable by this Court, absent exceptional circumstances, none of which are asserted by Petitioner or are present here. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 73 S. Ct. 204, 97 L. Ed. 168 (1952); *Grayson v. Harris*, 267 U.S. 352, 45 S. Ct. 317, 69 L. Ed. 652 (1925); *Portland Railway, Light & Sign Power Co. v. Railroad Commission*, 229 U.S. 397, 33 S. Ct. 820, 57 L. Ed. 1248 (1913).

2. Any interest held by Petitioner in the insurance policy issued by Respondent was divested by the assignment.

A second, independent, non-federal ground also exists for affirmance of the court below; that is, Petitioner divested itself of any interests it may have had in the insurance policy by virtue of its assignment of the policy to Christ Gospel. The assignment to Christ Gospel, while not creating enforceable rights in Christ Gospel, because the written consent of Respondent had not been secured, did not mean that the assignment was of no effect and that Petitioner remained an insured under the policy. This is impossible. The policy could not affect the rights of two churches *inter se*, and an assignment of the policy *did* occur between Petitioner and Christ Gospel, leaving no enforceable right in Petitioner, even if the policy was not enforceable by the assignee. No rights remained in the assignor, Petitioner. As stated in 16 Couch on Insurance 2d, §63: 168, at 741:

> "As the consent provision [of a policy] is designed for the protection of the insured, the failure or even refusal of the insured to give consent does not affect the validity of the assignment as between the assignor and the assignee or rival claimants to the fund."

Thus, as the court of common pleas pointed out, as to third persons, the written assignment of a contract is valid without notice to the obligor, even though he himself is not bound until the required notice is received. See generally *Portugese-American Bank v. Welles,* 242 U.S. 7, 37 S. Ct. 3, 61 L. Ed. 116 (1916). Accordingly, although Petitioner had no legal *right* under the policy to assign it without Respondent's consent, it did have the legal *capacity* to transfer its interests, if any, to Christ Gospel regardless of whether the policy remained enforceable in the hands of either. Once again, it is emphasized that a contract of insurance is a personal one and there are good public reasons for recognizing that Presbyterian assigned the policy and had no enforceable rights as an insured under it: with the assignment, which the law recognizes as complete between the churches, the risk may or may not have increased, and as found by the court of common pleas, the risk was substantially greater to Respondent. But clearly under the policy, Respondent had the *right* to be notified and to consent or not to assume the increased risk. No rights remained against Respondent in Petitioner, since the assignment was complete.

In this regard, the intent of the parties to the assignment was manifest. The assignment provided that Presbyterian does "hereby assign and set over *all right, title and interest in and to the hazard insurance policy* together with all Riders and coverage as such contracts are now in effect." Moreover, the assignment was accompanied by a separate consideration of $750, which amount approximated the unexpired premium paid in ad-

vance for then current year by Westminster. Thus, as the Court of Common Pleas held:

> "Not only did this language effectively divest Presbyterian of any future or further interest in the policy, but it also demonstrated that Presbyterian had no wish to maintain insurance on a property it no longer owned. Other evidence introduced at trial also corroborates the conclusion that Presbyterian divested itself of any interest in the insurance policy, and Presbyterian's statement in its argument brief (p. 19), that the no-assignment clause has no effect as between assignor and assignee, seems to admit that Presbyterian retained no interest in the policy after the assignment." (Appendix to Petition for Writ of Certiorari at 17a).

It bears emphasizing in this connection that these are *factual determinations* made by the court sitting without a jury. The case was decided on the basis of application of purely state law to those facts. Either of the aforecited grounds clearly would support the decision reached by the trial court and the superior court, *independent* of the federal issue now pressed. While Petitioner requests this Court to do so, the Constitution does not invest this Court with the power to overturn a state court determination of applicable state law under the guise of constitutional interpretation merely because this Court might believe that it can provide a better rule or decision. *Murdock v. City of Memphis, supra; cf. Labine v. Vincent,* 401 U.S. 532, 91 S. Ct. 1017, 28 L. Ed. 2d 288 (1971). Accordingly, there being two independent, non-federal grounds to support the lower courts' decision in this case, the Petition must be dismissed.

C. The Superior Court's determination that Petitioner held no insurable interest in the Church premises does not offend the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Petitioner concedes, as it must, that the applicable test to be applied in this case is whether the challenged classification rests upon grounds wholly irrelevant to the achievement of a valid state objective. *Turner v. Fouche,* 396 U.S. 346, 90 S. Ct. 532, 24 L. Ed. 2d 567 (1970). Stated another way, the test is whether *any* state of facts reasonably may be conceived to justify the state's decision. *Salyer Land Co. v. Tulare Water District,* 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973). Moreover, as stated in *Beck v. Washington,* 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962), the Fourteenth Amendment does not insure uniformity of judicial decisions or immunity from judicial error. In a nutshell, this is the core of Petitioner's argument: that the common pleas and superior courts wrongly applied the common law doctrine of insurable interest, and in so doing, precluded Petitioner from recovery under the policy issued to Westminster by Respondent. Such an argument must be unavailing.

The Fourteenth Amendment permits a wide scope of discretion to states in enacting laws which effect some groups of citizens differently from others. The Constitutional safeguards afforded by that amendment are offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. Thus, the states are presumed to have acted within their constitutional powers, despite the fact that, in practice, their laws may result in some inequality. The equal pro-

tection clause goes no further than protecting against invidious discrimination. *McGowan v. Maryland,* 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961).

Thus, even had Petitioner properly presented the equal protection issue to the courts below, and even if there were no adequate independent, non-federal grounds for the decision rendered below, Petitioner carries a heavy burden in asserting a constitutional violation of this magnitude. That burden is not here met.

The stated core of Petitioner's argument is that the superior court has denied the right to contract for insurance to a class of people with an expectancy of an option to purchase, while granting it to others similarly situated in terms of the value of their interest to them (Petition for Writ of Certiorari at 11). In so posing the question Petitioner misses the mark. As stated by both the court of common pleas and the superior court, petitioner did not have an "expectancy of an option to purchase"; rather, its interest, at best, was a "mere *possibility* of the expectancy that it might exercise its option to repurchase upon the happening of a contingency." (Appendix to Petition for Writ of Certiorari at 8a). At the time of the fire, Petitioner had no interest whatsoever in the premises because there was no factual basis for the option to arise. Thus, under prevailing Pennsylvania law, as set forth in *Van Cure v. Hartford Fire Ins. Co.,* 435 Pa. 163, 253 A. 2d 663 (1969), Petitioner possessed no "insurable interest" at the time of the fire.

Petitioner urges this Court that the decision by the superior court in the present case, and the declination to review that decision by the Supreme Court of Pennsylvania, has somehow worked a subtle change in the common law of Pennsylvania regarding insurable in-

terests. A close examination of the *Van Cure* opinion, however, reveals that the instant case falls squarely within the *Van Cure* rule. Thus, no "subtle change" has been worked.

Petitioner ignores the fundamental policy underlying the opinions in *Van Cure* and in the present case. The requirement of an insurable interest is founded upon a valid public policy against wagering, and is well established in the common law. *See* discussion in *Van Cure*, 435 Pa. at 166, 253 A. 2d at 664. Thus, the Pennsylvania courts have consistently held that a policy holder must have an interest that will be damaged before he will be permitted to recover for the loss against for which he was insured. Petitioner makes much of the distinction between the "legally enforceable interest" theory and the "factual expectation" theory; however, as the superior court pointed out, Petitioner had no interest under *either* theory. This determination was wholly consistent with the previous holding of the Pennsylvania Supreme Court in *Van Cure*.

Moreover, Petitioner would have this court believe that it was powerless to protect whatever "interest" it claims it possessed. Certainly, there were any number of ways Petitioner could have protected its alleged interest. For example, Petitioner could have procured insurance upon its contingent contract rights with Christ Gospel. *Cf. Van Cure v. Hartford Fire Ins. Co.*, 435 Pa. at 171, 253 A. 2d at 667 ("[t]he rights listed might support a policy insuring against the possibility of the default of bond but not against any hazard to the property."). It could also have protected itself by requiring *Christ Gospel* to procure insurance covering the premises, thus guaranteeing a fund to rebuild the church. Thus, while under Penn-

sylvania law Petitioner had no "insurable interest" in the *property* in question, a number of other options were open to it, which would have guaranteed the very result now sought—the obtaining of a fund with which to restore the property. All of these options were open to Petitioner, yet were not pursued. It is compound fallacy to equate Petitioner's lack of diligence with a deprivation of constitutionally guaranteed equal protection of the laws.

Finally, Petitioner has totally failed to show how it was treated differently from others *similarly situated.* This is the crux of the equal protection clause of the Fourteenth Amendment, and does in the last analysis, demonstrate the patent insufficiency of Petitioner's present claims.

In *Van Cure,* the Pennsylvania Supreme Court clearly held that the mere expectancy of an option did not qualify as an insurable interest under Pennsylvania law. At best, Petitioner here had such an expectancy (although the superior and common pleas courts classified the interest, if any, as at most a *possibility* of an expectancy. Appendix to Petition for Certiorari at 8a and 18a-19a). Thus, Petitioner falls within the *same* classification as that outlined in *Van Cure.* As such, Petitioner is not subjected to a treatment any different than other persons similarly situated, and accordingly, its equal protection claim must fail. *Cf. Marchant v. Pennsylvania Railroad Co.,* 153 U.S. 380, 14 S. Ct. 894, 38 L. Ed. 751 (1894).

Conclusion

Based upon the foregoing discussion, it is respectfully asserted that this Court lacks jurisdiction to entertain the constitutional challenge now advanced. The guiding precedents of this court clearly hold that an issue not properly raised in the courts below may not be presented to this Court for the first time by petition for writ of certiorari. Petitioner, without any excuse, entirely failed to present the issue to the courts of the Commonwealth of Pennsylvania. Under these circumstances, the Petition must be dismissed.

Furthermore, valid, independent non-federal grounds exist for upholding the decisions of the common pleas and superior courts. Respondent was never notified of the merger of the original congregation and Petitioner, and did not consent to coverage of Petitioner. Secondly, Petitioner voluntarily divested itself of any interests which it might have had in the policy when it transferred that policy, for valid consideration, to Christ Gospel. Since such valid grounds exist for affirmance of the court below, independent of the federal question now pressed before this Court, the Petition must be dismissed.

Finally, Petitioner would have this court hold that the time-honored doctrine of insurable interest, as consistently applied by the courts of the Commonwealth of Pennsylvania, both in the *Van Cure* decision and in the present case, has undergone a subtle transformation in such a manner as to work a deprivation of equal protection of the laws under the Fourteenth Amendment to the United States Constitution. Inexplicably, although *Van Cure* was clearly the law of the Commonwealth, Petitioner failed to press the constitutional issue below. Thus it is bar-

red from raising it here. Moreover, it is fallacy for Petitioner to assert its own neglect in protecting what interest it felt it had, when *Van Cure* was clearly the law of the Commonwealth, and to turn this inattentiveness into a deprivation of equal protection. This the court should not permit. A rational basis exists for the doctrine, both generally and as applied in this case, and Petitioner's plea for "class" treatment of all persons falling outside the scope of the *Van Cure* decision should not be entertained in this Court. Petitioner has failed to show that the application of the insurable interest rule is a classification which rests on grounds wholly irrelevant to the advancement of a valid state objective. To the contrary, Respondent has shown that a state of facts may reasonably be conceived to justify the theory. Finally, that doctrine was consistently applied to Petitioner and all others similarly situated.

For all the foregoing reasons, it is respectfully requested that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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